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No. 07-1153

IN THE

Supreme Court of the United States

VOTERS EDUCATION COMMITTEE *et al.*,

Petitioners,

v.

THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Counsel for Petitioners

215822

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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DISCUSSION

Petitioner Voters Education Committee ("VEC") replies to the Respondents' Brief in Opposition ("Opposition") to the Petition for Certiorari ("Petition"). The Petition explained that the phrase "support or oppose" is unconstitutionally vague when regulating core First Amendment protected political speech and that the Washington Supreme Court's decision to the contrary creates a division of authority with rulings of several U.S. Courts of Appeals and this Court. The Opposition argues that a footnote by this Court in *McConnell v. FEC*, 540 U.S. 93 (2003), establishes that "support or oppose" is not vague and that the cases discussed in the Petition can be distinguished. But the footnote simply does not have the meaning that the Opposition – and the Washington Supreme Court – attribute to it. And the grounds on which the Opposition seeks to distinguish the contrary decisions of the U.S. Courts of Appeals and this Court do not withstand inspection.

Furthermore, developments since the Petition was filed have provided even more support for granting certiorari. The day before Respondents filed their Opposition seeking to minimize any split in authority, a divided Fourth Circuit opinion intensified the split and embodied it in microcosm. *North Carolina Right to Life, Inc. v. Leake*, No. 07-1438, 2008 WL 1903462 (4th Cir. May 1, 2008).

The *Leake* decision struck down the North Carolina statutory definition of a "political committee" as

unconstitutionally vague with a divided court ruling that proceeded as follows:

- The majority ruled that North Carolina's new "support or oppose" standard was fatally vague unless it was construed to require classic *Buckley v. Valeo* "express advocacy." *Id.* at *7-8. The court struck down an alternative construction of the "support or oppose" standard that allowed consideration of "contextual factors" to determine if speech "goes beyond a mere discussion of public issues in that [it] direct[s] voters to take some action to nominate, elect, or defeat a candidate." *Id.* at *4 (quoting N.C. Gen. Stat. § 163-278.14A(a)(2)).

- By contrast, the dissent cited the Washington case challenged here as demonstrating that North Carolina's "support or oppose" standard could not be held vague in light of footnote 64 of *McConnell*. *Id.* at *42 ("the phrase 'in support of, or opposition to, any candidate' in [the] state['s] political committee definition is not unconstitutionally vague").

The clash between the Fourth Circuit majority ruling and the Washington case is the same clash that exists between the *Leake* majority and the dissent. This new decision refutes the Opposition's assertion (at 24) that there is "no conflict concerning the meaning of [*McConnell*] footnote 64."

The Petition demonstrated that the Washington decision also splits from earlier rulings of the U.S. Courts of Appeals. The Opposition (at 19-21) discounts those rulings, asserting they focused on language in the challenged statutes other than "support or oppose." However, the challenged provisions were held unconstitutionally vague in their entirety. As the Petition pointed out (at 13 n.11) – and as the Opposition does not deny – this could not have occurred if the "support or oppose" language provided clarity.

For example, in *Center for Individual Freedom v. Carmouche*, the Fifth Circuit found vague and narrowed to express advocacy a Louisiana statute regulating spending "supporting, opposing, or otherwise influencing" an election. 449 F.3d 655, 663 (5th Cir. 2006) (quoting La. Rev. Stat. § 18:1483(9)). The Opposition asserts (at 20) that the term "otherwise influencing" was the focus of the vagueness concern. But if that were the only vague term, there would have been no reason for the court to limit the entire phrase to express advocacy as it did. Instead, the court would have construed the provision to apply to "supporting, opposing, or [expressly advocating the election or defeat of]" a candidate. The Opposition does not deny that the express advocacy saving construction was applied with equal force to both the "supporting or opposing" terms of the statute and the "otherwise influencing" term, nor does it explain how such a construction could have occurred if each of those terms were not vague.

The same is true with respect to the Fourth Circuit's pre-*McConnell* decision in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999). There

the Fourth Circuit struck down as vague a provision defining a political committee as a group "to support or oppose any candidate or political party or to influence or attempt to influence" an election. *Id.* (quoting former version of N.C. Gen. Stat. § 163-278.6(14) (amended 1999)). The Opposition cannot explain why all three terms were struck down if the "support or oppose" terms were not vague.

The Opposition similarly attempts, and similarly fails, to explain away the conflict between the decision below and *Buckley v. Valeo*, 424 U.S. 1 (1976). The Petition pointed out that the "supporting or opposing" standard upheld in the challenged Washington decision could not meaningfully be distinguished from "advocating the election or defeat" of a candidate, a standard that was held vague in *Buckley*. Strikingly, the Opposition does not claim that the standards can be distinguished. Instead, it asserts (at 22) that "*Buckley* focused on two other phrases."

Before reaching this Court, the *Buckley* case had been decided by the D.C. Circuit. That court had held that the "two other phrases" referred to by the Opposition were vague and had purported to save them from invalidity by construing them to apply only to speech "advocating the election or defeat" of a candidate. *Buckley*, 424 U.S. at 41-42. This Court agreed with the D.C. Circuit that the "other phrases" were vague, but it went on to reverse the narrowing construction imposed by the D.C. Circuit, holding that the phrase "advocating the election or defeat" also was vague, so that a further narrowing to express advocacy was necessary. *Id.* at 42-44. This was a considered and

explicit ruling, essential to the outcome, and it cannot be squared with the challenged decision's holding that "support or oppose" is not vague and requires no narrowing construction.

The Opposition's assertion (at 19 n.13) that the loyalty oath cases cited by the Petition did not involve the terms "support" or "oppose" is mistaken. *Cramp v. Board of Public Instruction* expressly held that the term "support" was vague. 368 U.S. 278, 286 (1961). And *Cole v. Richardson* summarized a series of cases involving those terms. 405 U.S. 676, 680-81 (1972).

Lastly, the Opposition reinforces the need for this Court to clarify the application of the "support or oppose" standard in footnote 64 of *McConnell*. The Opposition explicitly relies on footnote 64 (at 23-24) – as did the Washington Supreme Court – to justify application of the "support or oppose" standard to all independent political speech, refusing to recognize that it applies only to avowedly campaign-related actors like political parties. The dissent in the new Fourth Circuit decision gave the same mistaken meaning to footnote 64. *Leake*, 2008 WL 1903462, at *42. Given the host of states – and, increasingly, local governments[1] – across the country that employ language like "support or oppose" to regulate political speech, *see* Petition

[1] *See, e.g.*, D.C. Code § 1-1101.01(5) (defining "political committee" as including a group "engaged in . . . promoting or opposing the . . . election of an individual to office); Austin Tex. City Code § 2-2-2(12) (defining "independent expenditure" to be an uncoordinated "expenditure on behalf of, or opposing the election of, any candidate").

Appendix 190a-195a, an authoritative pronouncement is needed. Under our federal system, only this Court can provide that pronouncement and correct the Washington Supreme Court.

CONCLUSION

Certiorari should be granted to review this important issue on which the Washington Supreme Court and the U.S. Courts of Appeals are in conflict.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Counsel for Petitioners